No. 353.

Brief of Pendleton for D. E.

FILED
OCT 21 1897
JAMES H. McKENNEY

Supreme Court of the United States.

Filed Oct. 21, 1897.

BARROW STEAMSHIP COMPANY, LIMITED,
Plaintiff in Error,

against

MICHAEL KANE,
Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

F. K. PENDLETON,
Of Counsel for Defendant in Error.

Supreme Court of the United States.

BARROW STEAMSHIP COMPANY, Limited,
Plaintiff in Error,

against

MICHAEL KANE,
Defendant in Error.

Brief on behalf of Defendant in Error.

The certified question is, had the Circuit Court, on the facts stated in the certificate, jurisdiction to try the action and render judgment?

The action is a civil action at law of a transitory nature, involving more than $2,000, brought in the Circuit Court for the Southern District of New York by a citizen and resident of New Jersey against an alien corporation doing business in and having general managing agents in New York. These facts were admitted by the demurrer, and are set forth in the certificate.

Being an action of a civil nature at common law, involving more than the required amount between a citizen of the United States and a citizen of a foreign State, it is within the scope of the act of 1887, as amended by act of 1888, granting jurisdiction to the United States Circuit Courts.

As it is *not a suit between citizens of different States*, it does *not* come within the clause requiring that the suit be brought in the district of the residence of either the plaintiff or defendant, and the case *In re Hohorst, 150 U. S. Rep., page 653*, &c., decided that suits against aliens did not come within the provisions of the clause requiring that suit be brought in the district whereof the *defendant is an inhabitant*, on the ground that the "*inhabitant*" clause is only applicable to cases of a defendant inhabitant of *some* district within the United States, and the Court held that

> "such a person or corporation (to wit, alien), may be sued by a citizen of a State of the Union in any district in which *valid service* can be made upon the defendant."

The same rule is reiterated in Galveston, H. & S. A. Ry. *vs.* Gonzales, 141 U. S., 496.

It is conceded that plaintiff in error might have appeared voluntarily and the Court would then have had jurisdiction and that service on a specially authorized agent would be equally efficacious.

St. Clair *vs.* Cox, 106 U. S., 350.

The only possible ground, therefore, upon which want of jurisdiction can be predicated is that there was no valid service of process or an equivalent for such, and that plaintiff in error can now raise that question.

If the plaintiff in error was properly in Court by valid service, or if it failed to raise any question as to service by proper proceedings, so that such question was not before the Court, or if it appeared or in any way waived the question of service by neglecting to raise it at the proper time by appropriate methods, there can be no question as to the Court's jurisdiction.

The plaintiff in error does business in New York, has property there and general managing agents there conducting its business of a common carrier. Plaintiff was injured while a passenger in transit to New York City under a ticket entitling him to passage to that place. Process was served on the general managing agent in that city (there being no designation on file of any person upon whom service should be made as provided for by the New York statute), and was the proper method of service under the provisions of § 432 of the New York statute (see Certificate, pages 1, 2).

Plaintiff in error took no exception to the *method of service or its validity* either by motion to set it or the return aside (which was the proper course if it intended to raise such question) or otherwise, but appeared in the action and demurred on two grounds, viz. :

That it appears upon the face of the complaint that the Court has no jurisdiction for the reason ; *1. That neither party was an inhabitant or resident of New York.*

2. That plaintiff in error was a foreign corporation, and the cause of action did not arise within the State of New York.

The demurrer being overruled, plaintiff in error answered, and at the trial twice moved to dismiss the complaint on the same grounds, to wit :

That the want of jurisdiction appeared upon the face of the complaint.

The position of defendant in error is :

1. That on above facts no question as to the validity of service was before the Court.

2. Plaintiff in error, for all purposes of

giving jurisdiction over it, appeared in the action and waived any question as to regularity of service.

3. The service was valid.

Of these in their order.

I.—If plaintiff in error had desired to question the validity of the service it should have done so by motion to set aside the service or return. On such a motion all the facts could have been shown.

Carstairs *vs.* Insurance Co., 3 Fed. Rep., 833.
In re Hohorst, 150 U. S., 663.

Non constat that on such motion it might have appeared that the agent served was specifically authorized for that purpose, and there can be no doubt that service on an agent specially authorized would be good.

We do not mean in this connection to refer to the filing of a designation under § 432 of the Code mentioned in the certificate; that is a statutory provision. We mean that for ought that appears Henderson Bros. may have been specifically authorized to receive service of process. It is not a question of presumption, one way or the other, as suggested by opposing counsel, but as to the proper method of bringing the question to trial. If the issue was not before the Court there can have been no error.

In re Hohorst, above cited at page 663, illustrates how the facts on such motion could be brought out, and how the question could not be raised or disposed of properly on demurrer.

Instead of making such motion or in any other way by which the facts could appear questioning the service plaintiff in error demurred.

This did not and could not raise the question sought

by plaintiff in error to be raised in this case, viz.: that plaintiff in error had neither by express authority or implied consent authorized service to be made on its general agents in New York, and hence service on them did not bind it.

(*a.*) A demurrer to the complaint admits the facts stated and tenders an issue of law thereon ; it could not raise a question as to the actual or possible service of process. As was well said by Mr. Justice WHEELER in his opinion on the demurrer in this case :

" The question whether plaintiff's pleadings set forth a cause of action between parties over which the Court has jurisdiction may be raised by demurrer, but questions of regularity about bringing the suit cannot well be."

(*b.*) The only objection made by the demurrer in this case is based on the ground that the want of jurisdiction *appears on the face of the complaint.* It is manifest this could not refer to or bring up any question as to a valid service of process for the reason that the facts in regard thereto could not appear in the complaint ; defendant might appear or service be made on an agent specially authorized, or in many different ways.

The manner of service must postdate the complaint and could not form part thereof and could not be an issue at the trial.

The only questions raised or evidently intended to be raised by the demurrer was :

First, that the "inhabitant" clause of the Statutes of 1888 *did apply to alien* defendants, the point decided the other way in the Hohorst case, above cited, and

Second, that Section 1780 of the Code of the State of New York, providing that an action may be maintained in a State Court by a non-resident against a foreign cor-

poration, only where among other cases not material, the cause of action arose within the State, had curtailed the jurisdiction of the United States Court to the same extent, on the theory that the United States Statutes of 1888, vesting jurisdiction in the Circuit Court, *concurrent* with the Courts of the several States, restricted the jurisdiction of such Courts to the cases of which the State Courts had jurisdiction by virtue of the State statutes. See opinion of WHEELER, J., on demurrer, as follows:

> "By Section I of the Act of 1887, as amended by the Act of 1888 (25 Stat., 434), the Circuit Courts of the United States 'have original cognizance concurrent with the Courts of the several States, of all suits of a civil nature at common law or in equity,' 'in which there shall be a controversy between citizens of different States,' 'or a controversy between citizens of a State and foreign States, citizens or subjects,' when the matter in dispute exceeds $2,000. The Courts of the State of New York would not by the law of that State have jurisdiction of the action, for it is by a non-resident against a foreign corporation and arose out of the State (Code, Sec. 1780). As this is a suit of the required amount between a citizen of a State and an alien, the Circuit Courts of the United States would have jurisdiction of it unless the words "*concurrent with the Courts of the several States limit the jurisdiction of the Circuit Courts of the United States in each State to causes of action of which the Courts of the State would, by its laws, have jurisdiction.*" These words have always been used in the judiciary acts of the United States in this connection. The limitation would apply to suits in equity as well as at law. Still the Circuit Courts have always exercised, and been held entitled to exercise equity jurisdiction, in proper

cases, although the courts of the State were by its laws without any such jurisdiction (United States *vs.* Howland, 4 Wheat., 108; Livingston *vs.* Story, 9 Pet. 632; Neves *vs.* Scott, 13 How., 268; Noonan *vs.* Lee, 2 Black, 499). These words seem to have been intended to save to the State Courts their jurisdiction rather than to limit that of the Circuit Court of the United States, which is done only in this respect by the words, 'in which there is a controversy between citizens of different States,' 'or a controversy between citizens of a State and foreign States citizens or subjects.' "

The jurisdiction of the Circuit Courts is given throughout all the States by these latter words, and that of the State Courts is saved to them by the former if the State choose to confer it upon them; but the withholding of any part of it by a State from its Courts cannot have been intended to work a withdrawal *pro tanto* from the Circuit Courts. The question is whether Congress intended to confer just as much jurisdiction in this class of cases upon the Circuit Courts in each State as that State should confer upon its Courts, or full and uniform jurisdiction in all the States, and that full and uniform jurisdiction was and always has been intended seems clear (Cowles *vs.* Mercer County, 7 Wall., 118; Railway Co. *vs.* Whiton, 3 Wall., 270).

It is very evident that after their inability to sustain the points raised by the demurrer was patent counsel for plaintiff in error have endeavored to shift their ground to an objection to the validity of service.

(*c.*) A demurrer for want of jurisdiction over the person raises the question that the person is not subject to the jurisdiction of the Court, such as that he is a foreign

Ambassador, Minister, &c., not that original process has been improperly served.

Nones *vs.* Hope Mut. L. Ins. Co., 5 How. (N. Y.), 96.
Ogdensburgh R. R. Co. *vs.* Vermon R. R. Co., 63 N. Y., 176.

It is very important to bear in mind the distinction between the claim that the plaintiff in error was not *suable* by a non-resident, that is, that the Court could not entertain such an action because § 1780 had indirectly limited the jurisdiction of the United States Court in New York by directly limiting that of the State Court, which was the contention treated of in Judge Wheeler's above opinion, and the contention now urged that plaintiff in error was not *serviceable in invitum* by service on its general agents in New York, because § 432 of the Code was limited by said § 1780. In the first case no general appearance or specific authority could give jurisdiction. The point could be raised by answer or if the non-resident appeared at the trial it could be taken advantage of even then by motion. It is a claim of want of power in the Court.

Gervais vs. *Chicago, R. I. & P.*, 35 State Rep., 129.

In the second it is a question of defect in service, not a want of power in the Court over the cause of action, and would be cured by a general appearance or if the fact should be that the agent was authorized. The former contention would be raised by demurrer, the latter not, nor could the latter be taken at the trial, it not going to the power of the Court over the cause of action.

The learned counsel or plaintiff in error apparently overlooks this distinction in his brief (page 20).

He speaks of the plaintiff being *non suable* without his consent when he means *non serviceable* as though a consent were part of the cause of action and he suggests

that the complaint should have alleged such consent to prevent its being open to demurrer.

It might as well be contended that the complaint should be obliged to allege in a suit against a non-resident that the defendant would appear or could be personally served with process.

This is an entire misconception. We entirely agree, however, with the statement there made that the question raised by the demurrer was not whether proper means were employed to bring the defendant below into Court and that is just why we contend that the question now sought to be raised by plaintiff in error was not before the Circuit Court but was waived by the demurrer on other grounds.

It is true that the New York Code, Subd. 1, § 488, provides for a demurrer for want of jurisdiction of the person but this does not raise questions as to whether defendant is properly brought into Court. It refers as above stated to cases of foreign ambassadors and must be where State Courts have no jurisdictions in suits against them.

In Jones *vs.* The Hope Mutual Life Ins. Co., 5 How. (N. Y.), 96, above cited, the Court says, speaking of demurrers on this ground:

"If it is true that in one sense the Court never gets "jurisdiction over a party unless he is regularly served "with process, that is if irregular it will be set aside. "* * * The meaning of the clause (relating to demur- "rers) that the Court has no jurisdiction of the person is "that the person is not *subject to the jurisdiction* of the "Court, and not that the suit has not been regularly com- "menced, the defendant must relieve himself from such "irregularity by motion."

In Ogdensburgh, &c. R. R. Co. *vs.* The Vermont, &c. R. R. Co., 63 N. Y., 176, above cited, the Court says:

After the defendants appeared and demurred they

could not object that they had not been served with process. By their demurrer they raised the question that upon the facts stated in the complaint the Court had no jurisdiction of their persons, not that they had not been served with process. * * * A defendant can never appear and join an issue of law or of fact without waiving all objections to the regularity or sufficiency of the service of process upon him.

II.—By filing a demurrer, challenging the jurisdiction of the Court on the facts stated in the complaint, the defendant waived service of process and all questions as to any imperfections in or invalidity of the service (see above case).

This as well as filing an answer to the merits constituted an appearance.

A general appearance waives any defect in service.

Fitzgerald Co. *vs.* Fitzgerald, 137 U. S., 106.

Foster's Fed. Pr., page 200, lays down the rule,

"If a party joins with a special appearance and a motion to set aside service of process, a motion to dismiss the suit on another ground, he thereby waives his objection to the irregularity of the service and his proceeding is equivalent to a general appearance."

In St. Louis Co. *vs.* McBride, 141 U. S., 127, the defendant demurred on the ground,

1. That the Court had no jurisdiction of the person of the defendant.

2. No jurisdiction of the subject matter of the action, and

3. That the complaint did not state facts sufficient to constitute a cause of action.

The demurrer was overruled. Defendant contended that the action was not brought in the district of which defendant was an inhabitant.

The Court held that this question had been waived by the demurrer, as it united in it the fact that the complaint did not state facts sufficient to constitute a cause of action, and that this was an appearance and a pleading to the merits, and waived not only all defects in service, but all special privileges of the defendant, such as that he could not be sued in any other district than that whereof he was an inhabitant.

In Hall *vs.* Continental Life Ins. Co., 12 Fed. Rep., 357.

Defendant demurrer for want of jurisdiction acquired by service, and for want of equity.

The Court held that "as the defendant appeared and demurred the parties are before the Court, and the jurisdiction has attached, and there can be no question remaining on the demurrer except as to the equity of the bill."

The demurrer filed by defendant was expressly put on the ground that defendant was not an inhabitant of this district and the suit could not be maintained therein.

This was an assertion of a privilege or right which could not be placed in jeopardy until the Court had obtained jurisdiction by service or appearance. The assertion there of and submission by defendant of the question to the determination of the Court was a waiver or admission of the necessary prerequisite of service of process or appearance.

To ask for the protection of a right at the hands of the Court before raising the objection to the method of being brought into Court and having that question passed upon is a voluntary appearance.

In no one of the cases cited in the brief of plaintiff in error was the question of valid service either actual or potential raised by demurrer.

In St. Clair *vs.* Cox, 106 U. S., 350, and Lafayette Ins. Co. *vs.* French, 18 How., 404, the question was as to the validity in a collateral proceeding of a judgment *in personam* acquired by default on service on an alleged agent.

Maxwell *vs.* Atchison R. R., 34 Fed. Rep., 206; Carstans *vs.* Ins. Co., 13 Fed. Rep., 823; Mohr Distilling Co. *vs.* Ins. Co., 12 Fed. Rep., 474; United States *vs.* American Bell, 29 Fed. Rep., 17; Lung Chang, Admr. *vs.* N. P. R. R., 19 Fed. Rep., 254, were motions to set aside service of process.

In re Schellonberger, 96 U. S., 369, was a *mandamus* proceeding similar to Hohorst case.

In Eton *vs.* St. Louis, &c., 7 Fed. Rep., 139, the question was brought up by motion to dismiss the action on the specific ground that there was no proper service in other words to set aside the service or what is the same thing declare it invalid. It is evident from the case that no answer had been put in.

It may be conceded that if a defendant raises the objection to the service in the proper way by motion in the first instance and its motion being denied, takes an exception, it does not by thereafter demurring to the complaint or answering to the merits, waive its objection, because in such case the appearance is not voluntary.

Such is the effect of the decision in Harkness *vs.* Hyde, 98 U. S., 476.

There the objection to the method of service was made by motion and the Court specially pointed out that it was only where the objection to the service was taken in the first instance that it was not waived.

The case of Southern Pacific Co. *vs.* Denton, 146 U. S., 102, cited in brief of plaintiff in error is not only not inconsistent with this rule, but sustains it. There the question was not as to the validity of service, but it appearing on the face of the complaint that neither plaintiff nor defendant

were residents of the district, and it being a suit between citizens of different States, defendant demurred on the ground that the Circuit Court in that district had no jurisdiction under the Statute of 1888, because it was not the district of the residence of either party. Held, this was a proper way of raising such a question as it appeared on the face of the complaint. *That was not a question of service but of jurisdiction of the Court of that district*, a general appearance would not waive the point manifestly as it could be set up by answer. An answer omitting to set up the objection might, just as omitting to plead the Statute of Limitations. It is conceded, however, an appearance in the case at bar would be conclusive.

The above case is an illustration of the rule applicable to the case at bar. The objection raised by the demurrer herein that the defendant was not an inhabitant of this district, and hence suit could not be maintained therein, and that jurisdiction of the United States Court in suits by non-residents of the State was restricted by Sec. 1780 of the New York Code, were not waived by answer, because they were properly raised by the demurrer, but the question *of valid service of process* was not raised by demurrer, and hence was waived.

It cannot be argued that the plaintiff in error is not suable, and that such point is raised by the demurrer, because the contention of plaintiff in error is not that the Court did not have jurisdiction *to entertain a suit against it*, it concedes that it would if it appeared, and the same result would follow service on an authorized agent, but that it could not be served. It cannot, therefore, be said that the complaint shows that no suit was maintainable. Its contention is that service could not be acquired by compliance with § 432, but that does not necessarily preclude the possibility of maintaining the suit.

III.—But even assuming that the ques-

tion as to valid service by adverse process were properly before the Court, the judgment should be affirmed.

Counsel for plaintiff in error contends substantially that a corporation, although it may do business in a foreign State and sue in its Courts, it cannot be sued outside the State of its incorporation without its consent, either express or implied. It is evident from the authorities cited that the expression cannot *be sued*, as used by counsel, means that it cannot be *served* by process *in invitum* and so brought into Court against its will. It can appear or be served through an agent specifically authorized, or where a statute has prescribed a reasonable method of service of process of the corporation does business in that State it will be presumed to have consented that it may be served in such manner. There can be no question that service or a managing agent, as provided by § 432 of N. Y. Code, is a reasonable provision and calculated to raise the presumption that notice thereof came to the corporation and it is conceded that service in accordance with Sec. 432 of the New York Code was effected, but plaintiff in error contends that Sec. 1780 has impliedly limited the operation of Sec. 432.

(1.) Sec. 432 of the Code provides the method of service on foreign corporations generally, and under the above rule this corporation doing business in this State, must be deemed to have consented to be served as provided by that section of the Code, and this enures to the benefit of the United States Courts as well.

See above rule. *In re* Schollenberger, 96 U. S., 369.

In re Hohorst, 150 U. S.

But the contention of the plaintiff in error is that Section 1780 of the New York Code, which restricts the jurisdiction of State Courts in suits by non-residents against foreign corporations to cases arising within the State of New York, thereby in effect curtailed the scope of Sec. 432 of the Code, as applied to the Courts of the United States.

(1.) The question here presented has been squarely decided in a case exactly similar to the one at bar in Carstairs *vs.* Mechanics' and Traders' Ins. Co., 13 Fed. Rep., 823.

The plaintiff was a citizen and resident of Pennsylvania; the defendant was a corporation organized under the laws of the State of New York, and the suit was brought in the Circuit Court of the State of Maryland. The cause of action did not arise within the State of Maryland. By the statutes of the State of Maryland, jurisdiction of the State Courts was limited in suits by a non-resident against a foreign corporation to cases where the cause of action arose within the State. Service was made on an agent under the Maryland statute prescribing the manner of service on a foreign corporation. *It was held that the service was a valid service, although by force of the Statutes of Maryland the State Courts had no jurisdiction of such an action.*

The Court said that the object of the Legislature in restricting the jurisdiction of the State Courts was to spare the State and its Courts the expense and burden of litigations to which its own citizens were not parties, or which had not arisen within its limits.

This could not affect United States Courts either by curtailing their jurisdiction or limiting the cases in which service under the statute could be made. It is obvious that such considerations can have no bearing upon the jurisdiction of the United States Courts, either as a mat-

ter of law or a matter of policy. The very object of the creation of United States Courts is that a tribunal should be established, open to all citizens of the United States equally, and access should not be denied to a citizen of the United States residing in New Jersey when open to a citizen of the United States residing in New York.

Gordon *vs.* Longest, 16 Peters, 104.

(2.) The contention of counsel for plaintiff in error must be that the provisions of Section 432 are only applicable to cases in which the State Courts have jurisdiction, this would preclude the United States from obtaining valid service *in inritum* on a foreign corporation in all that class of cases in which the State Courts have no jurisdiction, such as admiralty, bankruptcy, patents and other cases in which jurisdiction of the United States Courts is exclusive of that of the State Court, and this is manifestly inconsistent with the decisions of the Supreme Court of the United States.

In re Hohorst, 150 N. Y., page 653, the defendant was an alien corporation, and the action was on a patent.

The service of adverse process in accordance with Section 432 of the Code of New York, was held good.

If the contention of counsel for plaintiff in error is true that a foreign corporation can only be served in the cases in which the State Court has jurisdiction, it is manifest that the service in the Hohorst case could not have been sustained, so that the following statement, in the opinion of Mr. Justice WHEELER on the demurrer, is strictly accurate, viz.:

"If the demurrer could be considered as raising any question of irregularity about the manner of bringing the suit, such that are apparent seem to be disposed of by *in re* Hohorst, 150 U. S., 653."

In cases where the State Courts had no equity jurisdic-

tion, it is still held the United States Courts exercised an equitable jurisdiction.

5 McLean, 285.
United States *vs.* Howland, 4 Wheat., 108.
Livingston *vs.* Story, 9 Pet., 632.
Neves *vs.* Scott, 13 How., 268.
Noonan *vs.* Lee, 2 Black., 499.

But such could not be exercised, except by consent, against a foreign corporation, if the theory of counsel for plaintiff in error is correct.

In cases of admiralty, it has been held that service can be made on foreign corporations in the same method as that provided by the laws of the States.

In re Louisville, 134 U. S. Rep., 488.

(3.) Section 1780 of the Code does not assume to be a qualification of Section 432. Section 1780 does not relate in any manner to how jurisdiction over the person is to be acquired, and is in an entirely different part of the Code. § 432 relates to service generally in all actions. § 1780 is in a chapter devoted to provisions in regard to special actions. It was a restriction as to the class of cases over which the State Courts should have jurisdiction, and was evidently adopted with a view, as was said in Carstairs *vs.* Mechanics' & Traders' Ins. Co., 13 Fed. Rep., 823, of relieving State Courts of the burden and expense of trying certain cases in which its citizens were not parties.

(4.) Prior to the Code the State Courts had jurisdiction over foreign corporations, no matter where the action occurred or whether by a resident or non-resident.

Robinson *vs.* Oceanic Steam Navigation Co., 112 N. Y., 315.

McCormick *vs.* Pennsylvannia Co., 49 N. Y., 303.
Morawetz, Sec. 977.

The provisions then existing in regard to the service on foreign corporations was substantially similar to that set forth in the provisions of Section 432 of the Code.

It is manifest, therefore, that if this action had been brought before the passage of Section 1780 of the Code, there could have been no doubt as to the question of service. The question, therefore, is— Did the passage by the Legislature of the State of New York of Section 1780 of the Code curtail the powers of the United States Courts? The Legislature of New York has no power, either directly or indirectly, to curtail the power of the United States Courts.

Lincoln County *vs.* Lining, 133 U. S., 529.

Bank of British N. A., 44 Fed. Rep., 641.

(5.) The United States Courts could, prior to Section 1780, obtain service by complying with Section 432.

If this was based on any implied assent, such implied assent is none the less strong because thereafter the Legislature of New York, in the exercise of its discretion, has chosen to close its Courts to a certain class of cases against foreign corporations. Such restriction was not intended to and could not affect the United States Courts. Its powers, therefore, remain the same, and a foreign corporation must be presumed to have continued to do business with full knowledge of and assent to this fact.

(6.) The learned counsel for plaintiff in error suggests on page 17 of his brief as to cases such as patents where the United States Courts have exclusive jurisdiction, that such cases could be divided into two classes, viz. :—where the cause of action (an infringement of a patent for instance), arose out of the State and where it arose within the State, as to the former service *in invitum* could not be obtained in suits by non-residents of New York ; as to the second, it does not seem open to such interpretation, but it is scarcely probable that the legislature could have in-

tended any such result and the suggestion illustrates the weakness of the contention that § 1780 was in any way intended to limit § 432 ; both should have their natural interpretation.

§ 1780 was an economic provision to spare to New York taxpayers the expense of the State Courts trying cases for the benefit of residents of other States.

§ 432 provided for a method of service on foreign corporations generally and is equally available in patent and other cases of which New York State Courts have no jurisdiction as in those of which they have. The learned counsel is evidently wrong in his statement on page 19 of his brief, that the State of New York has passed an act forbidding the issue of process against a foreign corporation in favor of a non-resident, where the cause of action did not arise within the State.

The case of

Bank *vs.* Huxter, 124 U. S., 721,

cited by opposing counsel, has no application. There Congress legislating within the scope of its constitutional powers took away from the State Courts jurisdiction in certain cases over National Banks, and it was held the effect was the same as if the State statutes giving the State Courts jurisdiction had expressly excepted national banks. It did not mean that the Act of Congress vacated or repealed the State statutes. If Congress should repeal the act, the powers of the State Courts would be just as before Congress had acted.

It is difficult to see what relevancy that case can have to the question under discussion.

(7.) Counsel for plaintiff in error further contends that even where there is a statute prescribing a matter of service it only relates to suits in regard to the business done in the foreign countries, although the statute prescribing the method of service makes no such limitation.

In some of the cases cited the expression in regard to business done in the State is used, but we think these were used in connection with special local statutes providing as a condition of doing insurance business that they could be served within the State on suits, policies issued or contracts made there. There is no reason or authority for holding that a statute providing broadly for service in all cases should be so limited. In many of the cases cited by counsel for plaintiff in error, in which the service is sustained, it would seem that the suits did not relate to business done in the State. And the New York Courts have held that § 432 of the Code relates not only to cases arising out of business not done in the State, but includes corporations not even engaged in doing business there.

Pope *vs.* Terre Haute Car. & Co., 87 N. Y., 137.

Under the large increase in corporate activity in all directions with their many officers and agents in different States there would seem to be no principle of natural justice or rule of convenience, requiring a restriction of their liability to respond in the Courts of any State where they do business

In Mohr, &c. *vs.* Insurance Co., 12 Fed. Rep., 474. opinion by Mr. Stanley Mathews, it was held that an action upon a policy of insurance is transitory, not local, and may, therefore, be brought whereever the company issuing the policy can be found without regard to where the contract was made or the subject thereof located. The Court says the Insurance law (*i. e.*, allowing foreign companies to do business) requires that they (*i. e.*, insurance companies) should expressly assent to its terms and consent to be sued through certain agencies before they are allowed to do business in the State. The defense is that that consent only goes to the extent of the terms of that statute, and is reasonably construed to cover only the

transactions arising under it. But even if that were so I should still think that under the OTHER general provisions of the statute making provision for service of process upon managing agents of foreign companies, their coming into the State by means of such agents for the purpose of transacting business was necessarily an assent to being sued in that way. * * * I think this is the necessary result of the authorities. * * * The only distinction then between the two cases is that here the causes of action were not created by the action of the agents of the corporation in this State. But by virtue of the general provisions of the statute relating to service on foreign companies even on the supposition that I am not authorized to construe the insurance law itself as requiring them to assent to be sued with reference to *all* causes of action—and I do not think it can be limited—I have thought this service was rightly had."

But this suit at bar is connected with business done in New York. Plaintiff in error is a common carrier of passengers to and from New York. Defendant in error was when injured a passenger on a ticket entitling him to a passage to and landing in New York. The injury was received while the corporation was performing—or assuming to perform its contract—part of which at least was to be performed in New York and which was part of the business it was there doing. It does not appear in the facts certified where defendant in error purchased his ticket. If in New York there would scarcely seem to be a doubt that the suit grew out of business in New York where the obligation originated, and it would seem to be highly artificial to make a distinction in the right to obtain service in New York between passengers to that point, purchasing their tickets there or elsewhere.

But independent of the existence of a State statute, jurisdiction of the person of a foreign corporation can be obtained by service on a proper agent.

All that is required to constitute service in common justice is that the defendant should be reasonably notified of the proceedings and opportunity given to defend. The plaintiff in error doing business here, and having the privilege of suing in our Courts, there is no reason in justice why it should not be sued here by United States citizens, and the Courts should not adopt a rule which would entail this result unless positively established by the authorities. While there are some cases which express the opinion that the existence of a State statute is a *sine qua non* of obtaining service *in invitum* on a foreign corporation, they do not necessarily decide the point, and the expressions are at most dicta, and not involved necessarily in the decisions.

They all hold that when a State has by statute prescribed a method of service that then a compliance with that method is sufficient, but it does not follow that such a statute is an absolute prerequsite, and that service could not be obtained in the absence of such statute. On the other hand, there are many cases which have sustained service in the absence of a State statute (see *post*).

The original rule confining the recognition of corporations strictly within the territorial limits of the country creating them has been so much extended by modern authorities that it may be considered to a large extent abrogated.

It is universally conceded that, although a corporation cannot technically migrate from the country where it is corporated, it may do business in other countries and may bring suits in the Courts of such countries, and its author-

ized agents may appear for it and be served with process in the Courts of such foreign countries. There is no reason against, but every reason in favor of, the rule that, if recognized for the purposes of maintaining suit and doing business, they should be recognized for the purpose of being sued and that, where service is made on the general officers, jurisdiction of the corporation *in personam* is obtained, providing the person served is actually engaged in the business of the corporation as an officer or agent within such foreign jurisdiction.

The case of service of an officer who happens casually, for his own private purposos, to be within a foreign jurisdiction, is an entirely different question. In the absence of any provision of statute making him so servable, there would seem to be many reasons for holding that service on such an officer should not be deemed a service on the corporation, as he is not within the foreign jurisdiction *qua* officer, but only personally; but where the officer or agent is actually engaged in carrying on the business of the corporation and acting for it, there would seem, either as a question of policy or natural justice, to be every reason in favor of and no reason against holding that service upon him is good even in the absence of a statute.

Where a corporation comes into a foreign jurisdiction, and through its general agents carries on business by permission of statute or general comity, an intent or consent that service on such agent shall bind the corporation can be implied just as well in the absence of a statute to that effect, and we submit that such is the law (see *post*).

The object of the statutes which have been passed has not been so much to enable a corporation to be sued by service on its officers or general agents, as to make it a condition of its doing business that it shall consent to be served through some *sub-agent or inferior* officer, who would not by his connection with the corporation be ordi-

narily deemed a proper person to be served, or that the company should designate some outside person not necessarily connected in any way with the corporation upon whom service could be made. In some cases it has prescribed that service may be made upon the corporation by serving the State auditor or other State officer.

The true rule would seem to be that wherever a company is carrying on its business through *general agents or officers in charge*, service on such agents or officers will be good without any special State statute, but where the State statute provides either expressly or by implication as a condition of doing business that the corporation may be served by service *on an inferior agent*, such service would be sufficient by reason of the statute.

The above is sustained by the authorities.

In St. Clair *es.* Cox, 106 U. S. Rep., 352, cited in brief of counsel for plaintiff in error, the question was as to the validity of the service made in accordance with the State statute; and the Court held that the service was good; but it does not follow that that was the only method of service, or that service on a general agent would not have been sufficient.

On the contrary, the Court says speaking of corporations:

"Its officers and agents constitute all that there is visible of its existence, *and they may be authorized to act for it without as well as within the State.* There would seem, therefore, to be no sound reason why, to the extent of their agency, *they should not be equally deemed to represent it in the States for which they are respectively appointed when it is called to legal responsibility for their transactions.*"

MORAWETZ on Corporations, Section 979:

"It is obviously impracticable to make service of a writ upon a corporation aggregate directly. *For this reason it is one of the implied conditions in the creation*

of every corporation aggregate, that its managing agents shall be invested with authority to receive service of process directed against the corporation."

See cases cited.

In Hayden *vs.* Androscoggin Mills, 1 Fed. Rep., the State statute specifying the manner of service on a foreign corporation was not complied with. Judge LOWELL held this immaterial. He says in his opinion, page 96:

"I think a trading corporation may be said to be personally present for the purpose of an action wherever it it has an established place of trade. This was so decided in England on principle, and as a new question as late as the year 1872 (Newby *vs.* Van Oppen, Law Reports, Queen's Bench, 293). * * * *In the United States most of the cases turn upon the words of the statute, but the reasoning is often more general, and is, I think, in substantial accordance with the law of England, namely: That a trading company is of right sueable in any country in which it conducts an important part of its business.*"

In Railroad Co. *vs.* Harris, 12 Wallace, 65, at the time of service there was no local statute, and the Supreme Court specifically stated, page 83, that service on the agent of a foreign company was good, independent of any statute as to service, and the Supreme Court later "*in re* Schollenberger," 96 U. S., hereinafter mentioned specifically referred to the point in this case that there was no local statute.

In Wilson Packing Co. *vs.* Hunter, 8 Bissell, 429, it was held that a forign company doing business in Illinois was liable to suit in the Federal Court there, although there was no statute in regard to service. Judge Drummond puts it on the ground that where a foreign corporation comes into a State and does business in a State, it is subject to the liability of being sued therein, irrespective of the existence of a State statute regulating service; and

he holds that it is so both on principle and authority, and says, on page 432, that he considers the question has been decided in the Supreme Court by the case of the Railroad Co. *vs.* Harris, 12 Wallace, above cited, where at the time of service there was no statute regulating the manner of service, and yet the Court assumed jurisdiction over the company.

To the same point see

Moch *vs.* Virginia Fire Ins. Co., 10 Fed. Rep., 690 (see page 700).

Moulin *vs.* Ins. Co., 1 Dutch, 57.

In Maxwell *vs.* Atcheson, &c. R. R. Co., 34 Fed. R., 286, cited by opposing counsel, the State statute specifically provided that service could be made on foreign corporation *only* where cause of action arose within the State, and in this respect differed essentially from § 432 of Code.

See § 8145, General Statutes of Michigan.

The Court then considers the question independent of the statute, and says:

"The general rule appears to be well settled that a "foreign corporation may be sued within any jurisdic- "tion wherein it carries on an important part of its busi- "ness."

"Where under the laws of the State it is re- "quired, as a condition of doing business within "the State, that it shall appoint an officer or "agent upon whom process may be served, such "corporation is always treated as 'found' within "the State, within the meaning of the judiciary, "and suits in the Federal Courts may be instituted by "service upon him. On the other hand, when an officer of "a foreign corporation is temporarily visiting or travel-

"ling within the State, it is equally well settled that ser-
"vice of process against the corporation cannot be made
"upon him *if the corporation is not actually doing busi-*
"*ness within the State, what is the character* or amount of
"business which the corporation must do to subject its
"agent to the service of process within the foreign State,
"is left in some doubt by the authorities. If it have an
"office for the general transaction of its business—the sale
"of its goods if it be a manufacturing company, or the
"making of contracts and the receipt of freight and pas-
"sengers for transportation if it be a railroad—it would
"appear to be sufficient."

If this Court cannot bring the plaintiff in error into Court by adverse process, it follows that while the plaintiff in error could sue defendant in error in the Courts of the United States, all remedies for the defendant in error, who is a citizen of the United States by suit at law for an injury done him while on a ship coming to this country, is barred, unless he seeks such relief as he may get by suing in a foreign country. A construction which leads to such a denial of justice to a United States citizen should not be adopted unless absolutely necessary. In view of the large number of United States citizens non-residents of New York landed here every year by foreign corporations, this question is one of great importance. Although the State of New York may for economical purposes refuse to extend the use of its Courts to citizens of other States, that is, if any, so much the greater reason why access should be open to them to the United States Courts.

The question certified should be answered in the affirmative.

F. K. PENDLETON,
Of Counsel for Defendant in Error.

PARRISH & PENDLETON,
Attorneys.